

GHANA / JUDGMENT

Republic Vrs Eshun [2023]

GHACC 241 (28 March 2023)

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BEFORE HER HONOUR GLORIA N.B. LARYEA SITTING AS CIRCUIT COURT JUDGE AT THE CIRCUIT COURT, MANKESSIM ON THE 28TH OF MARCH, 2023. Suit No.: B14/4/2023 THE REPUBLIC VRS. SAMUEL ESHUN EBO AIKINS ... ACCUSED PERSON

JUDGMENT

The accused stands trial on three charges of: dangerous driving contrary to section 1 of the Road Traffic Act, 2004 (Act 683) as amended by Act 761; negligently causing harm contrary to section 72 of the Criminal and Other Offences Act, 1960 (Act 29); and use of a motor vehicle without a valid road user certificate contrary to section 94(2) of the Road Traffic Act, 2004 (Act 683) as amended by Act 761. To all three charges the accused pleaded not guilty; this would be the subject of comment by the Court subsequently. The facts upon which the prosecution relied for the establishment of their case were that: on 11th December, 2021 at about 5:30 pm, the accused was in charge of a Hyundai Atos Taxi with registration number GW 9116-18 (hereinafter called the Taxi). The accused was heading from Mankessim towards Abonko Township with one passenger on board. The said passenger alighted along the Abonko road. The accused then made a u-turn on the highway back towards Mankessim. In the process the now deceased motor bike rider heading from Mankessim crashed into the Taxi of the accused. The deceased motor bike rider sustained serious injuries and was rushed to the Saltpond Government Hospital where he died shortly upon arrival. The post mortem report revealed the cause of death as severe neck and head injury. 1 It is a clear and widely known principle of criminal law that the prosecution assumes the burden of proving the guilt of the accused on a plea of not guilty. In this present case, the offenses the prosecution is encumbered with are dangerous driving, negligently causing harm and driving a motor vehicle without a license. The ingredients of the above offenses are to be found in the following provisions; Section 1 (c) of the Road Traffic Act stipulates that a person who drives a motor vehicle dangerously on a road commits an offense and is liable on summary conviction to a term of not less than three years imprisonment. Section 2 of the Road Traffic Act goes further to explain dangerous driving as follows; “a person drives dangerously if;

- (a) the way that person drives falls below what is expected of a competent and careful driver; or
- (b) it is obvious to a competent and careful driver that it would be dangerous driving the vehicle

- (i) in that manner; or (ii) in its current state.
- (2) in determining what is expected of or obvious to a competent and careful driver in any particular case, regard shall be had to
 - (a) the circumstances of which the accused could be expected to be aware;
 - (b) any circumstances shown to have been within the knowledge of the accused and
 - (c) the condition of the road at the relevant time.” It is absolutely essential that prosecution establishes that the accused drove below what is expected of a competent and careful driver and that it would have been obvious to a 2 competent and careful driver that the manner in which he drove that fateful day would be dangerous. On the second count of negligently causing harm, prosecution was expected to fulfill the ingredients of the offence as embedded in section 72 which reads as follows: “Whoever negligently and unlawfully causes harm to any person shall be guilty of a misdemeanour.” It must therefore be proved that though the accused never intended to cause bodily harm to the deceased, he nevertheless caused it by his voluntary act (his driving), done without such skill and care as reasonably necessary under the circumstances. The last hurdle for prosecution to surmount will be to demonstrate that the accused was in charge of a motor vehicle without a valid road user certificate contrary to section 94(2) of the Road Traffic Act, 2004 (Act 683) as amended by Act 761. To satisfy the relevant elements of the aforementioned offenses, the prosecution provided the Court with the following pieces of evidence through three prosecution witnesses. The first two prosecution witnesses were by-standers who witnessed the accident. They told the Court that after the accused dropped off his passenger, he turned onto the Cape Coast high way towards Mankessim. It was while the accused was making this turn on the high way that the deceased motor bike rider crushed into the taxi being driven by the accused. PW1 and PW2 recalled how they assisted the transportation of the injured bike rider who was incidentally a police corporal, to the Saltpond Government hospital. Unfortunately, he died while receiving treatment. PW3 the investigator in charge of the case solidified the case of the prosecution against the accused when he tendered the following exhibits among others; the post mortem report (Exhibit C) and a sketch of the accident scene (Exhibit D). Ultimately, he 3 concluded that the accused had made a u-turn on the high way without observing road traffic courtesy. It is noteworthy that the appellant did not put this version of the facts relating to the accident to any of the prosecution witnesses through cross-examination. It is equally noteworthy that when he was given the opportunity to open his defence he elected to remain mute. This was the position he assumed and maintained even though he was warned by the Court of the implications of not cross-examining or opening his defence. What therefore is the resultant legal position? Generally, failure to cross-examine on a piece of evidence amounts to an admission of that evidence. The authority for this proposition is *Fori v. Ayirebi* [1966] GLR 627 in which it was held that: “where a party had given evidence of a material fact and was not cross examined upon, he need not call further evidence of that fact.” Furthermore, at the close of prosecution case when the Court formed the opinion that there was a case for the accused to answer, he

refrained from opening a defence. Again, the accused was warned on the legal effects of not putting up an opposing case to that established by the prosecution. The accused stood by his decision not to open a defense. The court after examining the evidence before it, needed to borrow the words of ROGER KORSAH J. (as he then was) in the case of MORO v. THE REPUBLIC [1979] GLR 256-262; “It seems to me that, in exceptional circumstances, where the facts of the case are such that the accused, in the ordinary course of events, ought to say something in answer to the charge, and he refuses to make any statement, then the court is entitled to comment adversely on his failure to make a statement when the opportunity was offered; and the court may justifiably ground a conviction on such refusal if, but only if, there is sufficient evidence available which, if believed, may support a conviction, yet taken together with the refusal by the accused to give an explanation or disclaimer, the refusal adds colour to the evidence and leads the court to conclude, that the accused was guilty of the offence charged.” Furthermore, R v Ajani (1939) 3 WACA 3 which was approved in Armah v the State

[1961] GLR 136, SC, The State v Afenuvor [1961] GLR (Pt II) 655, SC; Moro v The Republic [1979] GLR 256 are all authorities for the proposition that if by the close of the case for prosecution, the accused is called upon to open his defense but he refuses to offer any defense, he can be properly convicted provided the evidence given by the prosecution justifies the conviction. In the instant case, there is an abundance of evidence emanating from the prosecution to sustain a conviction against the accused on all three counts. On count one of dangerous driving there is no lack of evidence from prosecution’s corner. PW1 and PW2 were by-standers who witnessed the accused make a u-turn in the middle of a major high way immediately after dropping of his passenger. The testimonies of these eye witnesses stands to show that the accused without waiting to see whether there was an on-coming vehicle in haste made a u-turn on the Mankessim – Cape Coast high way. A competent driver in his position would have ensured that there were no on-coming vehicles before attempting the dangerous u-turn he made on a high way. Indeed the idea of making a u-turn on a high way is not acceptable by road use etiquette but if it must be done, it must be done with the utmost care and skill. This the accused was clearly lacking. It is without hesitation that the Court must admit wholly the evidence of prosecution against the accused on account of his dangerous driving. Indeed the accused himself did not find it worthy to raise even a feeble challenge to the case of the prosecution. The accused is found guilty on Count 1. On the evaluation of the evidence as a whole, it stands to reason to find as a fact that the accused did negligently cause harm to the deceased. The post mortem report of the 5 deceased indicated that the accident caused by the dangerous driving of the accused caused him fatal bodily harm, specifically severe neck and head injury. The degree of negligence exhibited by the accused was of the highest degree, that which is required to found criminal liability in negligence. In Riddell v. Reid [1943] A.C.1 Lord Porter also said at p. 31; “A high degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability.” The proper understanding of the evidence is the accused failed to employ the skill and care required

by a driver specifically one on a busy high way. In abandoning the skill expected of a driver, his actions though not intentional caused the accident that ultimately killed the deceased. Had he exercised the skill and care he as a driver owed other road users the deceased would have been saved from an untimely death. Again, the accused who has no defense is found guilty of negligently causes harm. He is accordingly convicted on count 2. Finally, the evidence of the prosecution shows that at the time of the accident the accused was using his taxi without the required road user certificate. This is a fact which must be accepted by the Court seeing that the accused did not adduce any evidence to rebut same. In the circumstances the accused is found guilty on count 3 and convicted accordingly. The point which must be made is that the accused fully aware that he possessed no defense to all three charges should have taken advantage of the opportunity to admit his guilt at the first given chance; when he was called upon to plead to the charges. This would have led to the mitigation of the sentence to be passed upon him. In sentencing the accused the factors that will determine the severity of his sentence are as follows; he led the honourable Court through a time consuming trial when he had no defense. He added to the number of lives recklessly claimed on the Accra-Cape Coast road due to the senseless haste and speed of drivers who simply lacked the skill to possess a driving license. Count 1: two years imprisonment. Count 2:three years imprisonment Count 3:one year imprisonment Sentences to run concurrently. HH GLORIA N.B. LARYEA CIRCUIT COURT JUDGE 7

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